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80-749

No.

IN THE

Supreme Court of the United States

October Term, 1980

STATE OF DELAWARE,

Petitioner,

v.

WALTER EVANS

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

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QUESTION PRESENTED

Does the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment to the United States Constitution, and the holding of *Blockburger v. United States*, 284 U. S. 299 (1932), prevent the imposition of cumulative sentences for the crimes of Manslaughter, defined as a reckless killing, and Possession of a Deadly Weapon During the Commission of a Felony, the Manslaughter, where the legislature clearly intends the imposition of such cumulative sentences.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CITATIONS	iii
CITATION TO OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
I. This Case Presents an Important Question Involving the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution as Applied to the States Through the Fourteenth Amendment of the United States Constitution	6
II. The Decision Below Is Incorrect	8
III. Review Is Necessary to Prevent Further State Confusion	11
CONCLUSION	12
APPENDIX A	A1

TABLE OF CITATIONS

Cases: Page

Blockburger v. United States, 284 U. S. 299 (1932) ..... i, 10

Busic v. United States, — U. S. —, 100 S. Ct. 1747 (1980) ..10, 11

Hunter v. State, — A. 2d —, cert. filed, — U. S. —, No. 80-283 (August 24, 1980) 6, 7, 8, 9, 10, 11

People v. Brintley, 280 N. W. 2d 793 (Mich. 1979), appeal dismissed sub nom., Brintley v. Michigan, 444 U. S. 948 (1979) 7

Sours v. State, 593 S. W. 2d 208 (Mo.), vacated and remanded, — U. S. —, 100 S. Ct. 2395, aff'd on rehearing, — S. W. 2d — 27 Cr. L. 2557 (August 18, 1980) 7

State v. Evans, Del. Supr., — A. 2d — (1980) 6, 7, 8, 9, 10

State v. Morgan, 592 S. W. 2d 796 (Mo.), vacated and remanded, — U. S. — No. 79-1602, 28 Cr. L. 4022 (October 8, 1980) 7

Whack v. State, — Md. —, 416 A. 2d 265 (1980) 7

Whalen v. United States, — U. S. —, 100 S. Ct. 1432 (1980) 7, 8, 9, 10, 11, 12

Federal Statutes:

28 U. S. C. § 1257(3) 1

Delaware Statutes:

11 Del. C.:

§ 225(5) 2

§ 612 5

§ 613 5

§ 632 .....2, 3, 5, 6

§ 636 5

§ 1447 .....2, 3, 5, 6

United States Constitution:

Fifth Amendment .....i, 2, 6, 8, 10, 11, 12

Fourteenth Amendment .....i, 2, 6, 8

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Delaware entered in the above-captioned case on September 8, 1980.

CITATION TO OPINION BELOW

The opinion of the Delaware Supreme Court, which is not yet reported, is attached hereto as Appendix A.

JURISDICTION

The judgment of the Delaware Supreme Court was entered on September 12, 1979. After a motion for reargument was filed, the Court ordered additional briefing and argument. The Delaware Supreme Court issued a final opinion on September 8, 1980. Jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Five:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment Fourteen, Section One:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

The following Delaware Statutes are involved in this case: 11 *Del. C.* §§ 222(5), 1447 and 632.

11 *Del. C.* § 222(5):

> Deadly weapon includes any weapon from which a shot may be discharged, a knife of any sort (other than an ordinary pocketknife carried in a closed posi-

tion), switchblade knife, billy, blackjack, bludgeon, metal knuckles, slingshot, razor, bicycle chain or ice pick.

11 *Del. C.* § 1447:

(a) A person who is in possession of a deadly weapon during the commission of a felony is guilty of possession of a deadly weapon during commission of a felony.
Possession of a deadly weapon during commission of a felony is a class B felony.

(b) Notwithstanding § 4205 of this title, the minimum sentence for a violation of this section shall be not less than 5 years which minimum sentence shall not be subject to suspension and no person convicted for a violation of this section shall be eligible for parole or probation during such 5 years.

(c) Any sentence imposed upon conviction for possession of a deadly weapon during the commission of a felony shall not run concurrently with any other sentence. In any instance where a person is convicted of a felony, together with a conviction for the possession of a deadly weapon during the commission of such felony, such person shall serve the sentence for the felony itself before beginning the sentence imposed for possession of a deadly weapon during such felony.

(d) Every person charged under this section over the age of 16 years shall be tried as an adult, notwithstanding any contrary provision of statutes governing the Family Court or any other state law.

(e) A person may be found guilty of violating this section notwithstanding that the felony for which he is convicted and during which he possessed the deadly weapon is a lesser included felony of the one originally charged.

11 *Del. C.* § 632:

A person is guilty of manslaughter when:

(1) He recklessly causes the death of another person; or

(2) With intent to cause serious physical injury to another person he causes the death of such person, employing means which would to a reasonable man in the defendant's situation, knowing the facts known to him, seem likely to cause death; or

(3) He intentionally causes the death of another person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance;

STATEMENT OF THE CASE

On the evening of August 22, 1977 Adrian Taylor and William Stephens were shot by Walter Evans. The incident arose from an altercation involving a domestic conflict between Evans, his wife Sally and William Stephens.

Stephens was having a barbeque at his home and had invited Taylor and Sally Evans. When Walter Evans arrived an altercation ensued and Evans shot both Taylor and Stephens in the back. Stephens died as a result of the gunshot wounds.

The New Castle Grand Jury returned an indictment against the Respondent on October 4, 1977 for the charges of Murder in the First Degree, 11 *Del. C.* § 636, Assault in the First Degree, 11 *Del. C.* § 613, and two counts of Possession of a Deadly Weapon During the Commission of a Felony, 11 *Del. C.* § 1447.

A jury trial was held in the Superior Court for the State of Delaware from March 20, 1978 to March 29, 1978. The jury returned verdicts of guilty on the lesser included offenses of Manslaughter, 11 *Del. C.* § 632, and Assault in the Second Degree, 11 *Del. C.* § 612, and two counts of Possession of a Deadly Weapon During the Commission of a Felony, 11 *Del. C.* § 1447. The Respondent was sentenced on June 17, 1979 to a ten year sentence for Manslaughter, two years for Assault in the Second Degree, and two consecutive mandatory sentences of five years for each charge of Possession of a Deadly Weap During the Commission of a Felony. The Respondent appealed the convictions and sentences. On September 12, 1979 the Supreme Court of the State of Delaware affirmed both convictions and sentences. The Respondent filed a Motion for Reargument which was granted.

On September 8, 1980 the Delaware Supreme Court, sitting *en Banc*, affirmed the convictions but reversed the consecutive sentencing, holding that the Double Jeopardy Clause precluded consecutive sentences for the underlying felonies and the weapon offenses.

REASONS FOR GRANTING THE WRIT

I. This Case Presents an Important Question Involving the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution as Applied to the States Through the Fourteenth Amendment of the United States Constitution.

In *State v. Evans,* Del. Supr., — A. 2d — (1980) the Delaware Supreme held that the Double Jeopardy Clause of the Constitution of the United States as applied to the States was violated when Evans was sentenced separately and consecutively for the crimes of Manslaughter, 11 *Del. C.* § 632 and Possession of a Deadly Weapon During the Commission of a Felony, 11 *Del. C.* § 1447. The Court reached this conclusion on the basis of a "Blockburger-like rule of substantive law" which was adopted in *Hunter v. State,* — A. 2d —, *cert. filed,* — U. S. —, No. 80-283 (August 24, 1980).

In *Evans* the Court recognized, as it also did in *Hunter, supra,* the clear legislative intent to punish consecutively for the predicate felony, in this case Manslaughter, and the separate offense of Possession of a Deadly Weapon During the Commission of Felony. The Court, however, found that the Double Jeopardy Clause and this "Blockburger-like rule" required a judicial veto of that legislative intent.

The Court in *Hunter* expressed its concern about the increasing uncertainty of cumulative sentencing and the Double Jeopardy Clause as "resulting from the somewhat ambiguous and . . . puzzling pronouncements in recent United States Supreme Court cases." *Hunter, supra,* at A19.*

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* Reference to the *Hunter* opinion which at the time of this writing is still unreported, will be to the appendix to the writ of certiorari filed with this Court on August 24, 1980.

The Court went on to hold that:

> "We are not convinced that *Whalen* [*Whalen v. United States,* — U. S. —, 100 S. Ct. 1432 (1980)] controls the instant case in view of the ambiguities contained therein which we find in unexplained conflict with prior double jeopardy principles which we thought settled. We are unwilling to abandon those principles until the United States Supreme Court has more clearly and definitely abandoned them." *Hunter, supra,* at A24.

Although the Court in *Evans* did not repeat *Hunter's* invitation for this Court to clear up the confusion now existing in this area, it is clear *Evans* was decided on the identical basis expressed in *Hunter.*

The need for clarification in this area is underscored by a recent opinion in a neighboring state. The Maryland Court of Appeals, citing the *Whalen* case, has recently ruled that the State legislature can prescribe multiple punishment for offenses which would be the "same" under a "Blockburger-like rule." *Whack v. State,* — Md. —, 416 A. 2d 265 (1980). *See also, State v. Morgan,* 592 S. W. 2d 796 (Mo.), *vacated and remanded,* — U. S. — No. 79-1602, 28 Cr. L. 4022 (October 8, 1980); *Sours v. State,* 593 S. W. 2d 208 (Mo.), *vacated and remanded,* — U. S. —, 100 S. Ct. 2395, *aff'd on rehearing,* — S. W. 2d —, 27 Cr. L. 2557 (August 18, 1980); *People v. Brintley,* 280 N. W. 2d 793 (Mich. 1979), *appeal dismissed sub nom., Brintley v. Michigan,* 444 U. S. 948 (1979).

The State of Delaware maintains that this is an extremely important issue involving the role of the Delaware General Assembly to make criminal statutes and set penalties. This judicial veto of the General Assembly's clear intent to punish cumulatively calls into question the very roles each branch of government plays in the policy decisions in the area of criminal justice administration.

II. The Decision Below Is Incorrect

The State of Delaware contends that the Delaware Supreme Court erred in ruling that the Double Jeopardy Clause of the Fifth Amendment as applied to the States through the Fourteenth Amendment prohibits cumulative sentencing for two separate and distinct crimes where the clear intent of the legislature was to impose such cumulative sentences.

The Court in *Evans* applied the "Blockburger-like rule" adopted in *Hunter, supra.* The Court held that applying that rule to the evidence in the instant case required the cumulative punishment to be vacated because the "defendant's constitutional guarantee against multiple punishment and double jeopardy" had been violated. *Evans, supra,* Appendix A, p. A10.

This Court in *Whalen v. United States, supra,* held that cumulative sentences could not be imposed where Congress did not so intend but that "Congress is clearly free to fashion exceptions to the rule it chose to enact in § 23-1132." *Whalen, supra,* at 1439.

In reading all of the opinions filed in the *Whalen* case it is clear that had the intent of the lawmaker been clearer the decision of this Court would have been different. The majority stated: ". . . the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." *Whalen, supra,* at 1436. The Court went on to hold: "Had Congress authorized cumulative punishments, as the District of Columbia Court of Appeals held in this case, imposition of such sentences would not violate the Constitution." *Whalen, supra,* at 1440.

The concurring opinion of Justice Blackmun states: "The Court's holding today surely does not require that

the same result automatically be reached in a State where the legislature enacts criminal sanctions clearly authorizing cumulative sentences for a defendant convicted on charges of felony murder and the underlying predicate felony." *Whalen, supra,* at 1441.

Justice Rehnquist and the Chief Justice would clearly not reach the same result as the Delaware Supreme Court.

> Having already posited that the Double Jeopardy Clause imposes no restraint upon a legislature's ability to provide for multiple punishments, I believe it clear that a legislature could, if it so desired, provide for separate punishments under two statutory provisions, even though those provisions define the "same offense" within the meaning of *Blockburger.*
>
> *Whalen, supra,* at 1447

Once again, as in *Hunter* the Delaware Supreme Court found no ambiguity in legislative intent. "Again applying the principles, rationales, and conclusions announced in *Hunter,* we hold the instant Manslaughter case:

> "(1) that § 1447 creates an offense separate and distinct from the underlying § 632 felony of Manslaughter, the legislative intent being to subject this defendant to multiple penalties for his single criminal act." *Evans, supra,* Appendix A, p. A9.

The situation presented in *Evans* is even clearer than that in *Hunter.* In *Hunter* the use of a weapon was a necessary element of the crime of Assault in the First Degree. In *Evans* no such requirement exists. Manslaughter can be accomplished in countless ways which do not require the use of a "deadly weapon." The Delaware General Assembly has clearly stated through the

passage of the criminal code that if a crime is committed with a "deadly weapon" a separate and distinct crime is also committed. The State agrees with Justice Quillen who stated: "In my judgment, the result reached by the majority is not constitutionally required and does not pay sufficient deference to the legislative policy-making role." *Evans, supra,* Appendix A, p. A10.

The Delaware Supreme Court used this "Blockburger-like rule" maintaining that it is constitutionally required.

> In *Hunter* as here, the *Blockburger* rule was not needed as a rule of statutory construction (as *Whalen* has now defined it) to ascertain the intent of the General Assembly regarding multiple punishment. A 'Blockburger-like rule of substantive law' was adopted in *Hunter,* however, as an evidentiary formula to determine which two sentences constitute punishment for the 'same offense' in violation of the principles of double jeopardy.
>
> *Evans, supra,* Appendix A, p. 8, fn. 7.

The State of Delaware contends that the holding in *Evans* is not required by the Fifth Amendment as interpreted in *Whalen v. United States, supra,* and, that the "Blockburger test" is nothing more than a rule of statutory construction that loses relevance when legislative intent is clear. This position has been recently reaffirmed by this Court in *Busic v. United States,* — U. S. —, 100 S. Ct. 1747 (1980).

The State of Delaware further suggests that the Delaware Supreme Court has, based upon its mistaken belief as to what the Double Jeopardy Clause of the United States Constitution requires, overstepped its constitutional position and has usurped power which is specifically and exclusively granted to the General Assembly.

III. Review Is Necessary to Prevent Further State Confusion

The State reiterates the position it took in *Hunter, supra.*

Dicta appearing in opinions of this Court has, as Justice Blackmun observed in *Whalen, supra,* caused confusion among state courts concerning the requirements of the Double Jeopardy Clause of the Fifth Amendment and multiple punishments. This confusion, the State of Delaware submits, has not been lessened by the holdings in *Whalen* and *Busic.* Quite to the contrary, unsure of what this Court has pronounced, the Delaware Supreme Court again holds that the Double Jeopardy Clause of the Fifth Amendment precludes multiple punishments even where the General Assembly specifically provided for such sentencing.

CONCLUSION

To answer the question left open in *Whalen v. United States, supra,* and to finally resolve the scope of multiple punishments and the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, the State of Delaware submits this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE
SUPREME COURT OF THE STATE
OF DELAWARE

No. 174, 1978

WALTER EVANS,
Defendant Below,
Appellant,

v.

STATE OF DELAWARE,
Plaintiff Below,
Appellee.

Submitted: August 21, 1980
Decided: September 8, 1980

Before HERRMANN, *Chief Justice*, DUFFY, MCNEILLY, QUILLEN and HORSEY, *Justices*, Court en Banc.

Upon appeal from Superior Court. Affirmed as to convictions; sentences set aside and remanded for resentence.

Morton Richard Kimmel and Michael Weiss (Argued), of Kimmel & Spiller, P. A., Wilmington, for defendant-appellant.

Charles M. Oberly, III (Argued) and Gary C. Linarducci, Deputy Attorneys General, Wilmington, for plaintiff-appellee.

HERRMANN, *Chief Justice* (for the majority):

The defendant was convicted of (1) Manslaughter upon William Stephens (under 11 *Del. C.* § 632)[1] and the related Possession of a Deadly Weapon during the Commission of a Felony (under 11 *Del. C.* § 1447);[2] and

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1. 11 *Del. C.* § 632 provides in pertinent part:

"§ 632. Manslaughter; class B felony.

"A person is guilty of manslaughter when:

"(1) He recklessly causes the death of another person; or

"(2) With intent to cause serious physical injury to another person he causes the death of such person, employing means which would to a reasonable man in the defendant's situation, knowing the facts known to him, seem likely to cause death; or

"(3) He intentionally causes the death of another person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance; * * *"

This conviction of Manslaughter was returned under Count I of the Information charging the defendant with Murder in the Second Degree in the following words:

"That is, he did shoot William Lee Stephens with a rifle, thereby causing his death."

2. 11 *Del C.* § 1447 provides:

"§ 1447. Possession of a deadly weapon during commission of a felony; class B felony.

"(a) A person who is in possession of a deadly weapon during the commission of a felony is guilty of possession of a deadly weapon during commission of a felony.

"Possession of a deadly weapon during commission of a felony is a class B felony.

"(b) Notwithstanding § 4205 of this title, the minimum sentence for a violation of this section shall be not less than 5 years which minimum sentence shall not be subject to suspension and no person convicted for a violation of this section shall be eligible for parole or probation during such 5 years.

(2) Assault in the Second Degree upon Adrian Taylor (under 11 *Del. C.* § 612)[3] and the related Possession of a Deadly Weapon During the Commission of a Felony (under § 1447). In sentencing, the Trial Judge merged

2. (Cont'd.)

"(c) Any sentence imposed upon conviction for possession of a deadly weapon during the commission of a felony shall not run concurrently with any other sentence. In any instance where a person is convicted of a felony, together with a conviction for the possession of a deadly weapon during the commission of such felony, such person shall serve the sentence for the felony itself before beginning the sentence imposed for possession of a deadly weapon during such felony.

"(d) Every person charged under this section over the age of 16 years shall be tried as an adult, notwithstanding any contrary provision of statutes governing the Family Court or any other state law.

"(e) A person may be found guilty of violating this section notwithstanding that the felony for which he is convicted and during which he possessed the deadly weapon is a lesser included felony of the one originally charged."

3. 11 *Del. C.* § 612 provides in pertinent part:

"§ 612. Assault in the second degree; class C felony.

"A person is guilty of assault in the second degree when:

* * *

"(2) He intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument; or

"(3) He recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or * * *."

This conviction was returned upon Count III of the Information charging the defendant with Assault in the First Degree [11 *Del. C.* § 613(1): intentionally causing "serious physical injury to another person by means of a deadly weapon * * *"] as follows:

"By means of a deadly weapon; namely shooting Adrian Taylor in the back with a rifle."

the sentences for the felony-weapons offenses with the corresponding sentences for the underlying felonies.[4]

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4. In imposing sentences upon the manslaughter (10 years imprisonment) and assault (2 years imprisonment) convictions, and upon the related felony-weapon convictions each carrying a minimum mandatory 5 year sentence of imprisonment, the sentencing Judge stated:

> "If I had to look at this case in terms of the law as it would be applied without mandatory minimum sentences, I would treat this as a manslaughter case, the type of manslaughter that results from a triangle situation, a domestic dispute, and in most cases I would think that a term of imprisonment, given parole possibilities of ten years or fifteen years, would be a proper sentence. The weapons charges and mandatory minimums completely distorts that, so I have to deal with it in terms of that.
>
> "I will say about the defendant, Mr. Evans, I find nothing in your conduct, your background, that would suggest that I would have to be sentencing you to these long prison terms, but I have no choice. The law tells me what I have to give you in this situation, and I am going to give you the minimum I can give you under all the circumstances. I recognize that the ten years mandatory minimum is equivalent to giving you thirty years which, I think, would not be justified under the facts of this case and under the jury's decision, but I have no discretion.
>
> "I will say this: I am going to merge the weapons charges with each of the related charges, that is, as named in the indictment, possession of a deadly weapon during the commission of a felony, • • • that felony is merged with the manslaughter, murder in the first degree in the indictment. • • • The weapons charge in the indictment, is merged with the felony of assault first degree, found by the jury to be assault second degree.
>
> "It is my belief that that is the only merger that I can make. • • •."

The record also discloses that the prosecutor stated at the time of sentencing:

The panel of this Court affirmed. The defendant filed a Motion for Reargument, requesting this Court to remand the case for resentencing under *Davis v. State*, Del. Supr., 400 A. 2d 292 (1979). At this point, the panel decided that the case should be scheduled for rehearing and determination by the Court en Banc under Rule 4(d).[5]

Before reaching the merits of the pending issues, it must be noted, upon this review of the situation below, that the Trial Court's merger of sentences was improper under the governing Statute. Prior to 1976, it was within the discretion of the sentencing Judge to merge the sentence imposed upon a felony-weapon conviction under § 1447 with the sentence imposed upon the conviction for the underlying felony. *Dobrolenski v. State*, Del. Supr., 328 A. 2d 447 (1974); *State v. Honie*, Del. Supr., 310 A. 2d 872 (1973). In 1976, however, the General Assembly added subsection (c) to § 1447 which states:

---

4. (Cont'd.)

"• • • [I]t [*Simpson v. United States*, 435 U. S. 6 (1978)] leads me to believe that if Your Honor finds that a ten-year sentence should be imposed in this case, and you can do that, I am hopeful that they will reverse you and sentence the man to five • • •."

5. Rule 4(d) provides:

"(d) *Rehearing by Court en Banc.* In the event a panel is unable to reach a unanimous decision in a case under submission, or in the event that there is a reasonable likelihood that a prior decision of the Court may be modified or overruled, the presiding Justice of the panel, if not the Chief Justice, shall so notify the Chief Justice in writing; and the case shall thereupon be scheduled on a priority basis for rehearing and determination by the Court en Banc without further briefing unless ordered by the Court."

Accordingly, the *per curiam* opinion filed herein by the panel, dated September 12, 1979, is hereby withdrawn.

> "Any sentence imposed upon conviction for possession of a deadly weapon during the commission of a felony shall not run concurrently with any other sentence. In any instance where a person is convicted of a felony, together with a conviction for the possession of a deadly weapon during the commission of such felony, such person shall serve the sentence for the felony itself before beginning the sentence imposed for possession of a deadly weapon during such felony."

This section was clearly a legislative reaction to *Honie* and *Dobrolenski* and prohibited discretionary merger of the sentence for a violation of § 1447 with the sentence for the underlying felony. Since the sentencing here took place in 1978, § 1447(c) is clearly controlling and, therefore, the sentences were not properly merged.

Returning now to the issues before us: the defendant requested this Court to remand the case to the Superior Court for resentencing upon the underlying manslaughter and assault offenses rather than upon the felony-weapon offenses, invoking *Davis v. State,* Del. Supr., 400 A. 2d 292 (1979). In that case it was held that dual convictions and consecutive sentences for Robbery (under 11 *Del. C.* § 832) and possession of a deadly-weapon during its commission (under § 1447) could not stand, and that the conviction and sentence in that case must fall. *Davis* had not been decided at the time of the filing of the defendant's opening brief in support of this appeal; and *Davis* was decided just a few weeks before the filing of the defendant's reply brief in which it received only brief treatment. Thus, the impact of the then very-recent *Davis* case received less initial attention by counsel in this case than otherwise would have been the situation.

In the interim, while the instant Motion for Reargument was still pending, *Hunter v. State,* Del. Supr., —

A. 2d — (6/14/80) was decided, settling many of the questions raised herein.

Adopting the approaches, rationales, and conclusions established in *Hunter,* we come to the following conclusions:

I.

First as to the convictions for Assault in the Second Degree upon Adrian Taylor and the related charge of Possession of a Deadly Weapon During the Commission of that Felony:

Davis is *not applicable* in this Assault case for the reasons stated in *Hunter.*[6] The Assault Statutes lack the legislative history and the built-in enhancement provision of the Robbery Statute, 11 *Del. C.* § 832, which was involved in *Davis.* In *Hunter,* this Court sitting en Banc stated:

> "Moreover, unlike the Robbery Statute § 832 (a)(2) in its relationship to § 1447 which arises out of the mere 'display' of a deadly weapon, by the three Assault Statutes the General Assembly seeks to enhance punishment more for the perpetrator's state of mind and the seriousness of the injury than for the possession of the deadly weapon used. The Assault in the Third Degree Statute [11 *Del. C.* § 611(2)] proscribes the infliction by means of a deadly weapon of physical injury with *criminal negligence*; violation § 612(2) is a misdemeanor. The Assault in the Second Degree Statute [11 *Del. C.* §§ 612(2) and (3)] proscribes the infliction by means of a deadly weapon of physical injury *intentionally,* or of serious physical injury *recklessly;* violation of *either*

6. Although *Hunter* was an Assault in the First Degree case under 11 *Del. C.* § 613(1), it is indistinguishable on the law in this Second Degree Assault Case.

> of these sections is a class C felony. Finally, the Assault in the First Degree Statute [11 *Del. C.* § 613(1)] proscribes the infliction by means of a deadly weapon of serious physical injury *intentionally*; violation of § 613(1) is a class B felony. There is no enhanced punishment by reason of the possession of a deadly weapon built into the Assault Statutes. Clearly, therefore, it cannot be said, as in *Davis* regarding § 832(a)(2), that the purpose and effect of § 613(1) is the same as § 1447."
>
> — A. 2d at —.

Accordingly, we hold that the *Davis* case is inapposite in the instant case and that, therefore, the § 1447 conviction and sentence here does not fall by reason of *Davis*.

Further applying the rationales and conclusions stated in *Hunter*, we hold in the instant Assault case: (1) that § 1447 creates an offense separate and distinct from the §§ 612(2) and (3) Assault offenses, the legislative intent being to subject this defendant to multiple penalties for the single criminal act against Adrian Taylor; (2) that applying to the evidence in the instant case the "Blockburger-like rule" adopted in *Hunter*,[7] multiple punishments for the "same offense" have been imposed herein because the § 1447 offense required proof of no fact not required by the §§ 612(2) or (3) offense; (3) that the defendant's constitutional guarantee against multiple punishment and double jeopardy having been violated, the

7. In *Hunter*, as here, the *Blockburger* rule was not needed as a rule of statutory construction (as *Whalen* has now defined it) to ascertain the intent of the General Assembly regarding multiple punishment. A "Blockburger-like rule of substantive law" was adopted in *Hunter*, however, as an evidentiary formula "to determine when two sentences constitute punishment for the 'same offense' in violation of the principles of double jeopardy." (See — A. 2d at —.

cumulative sentences imposed by the Trial Court in the instant case for the assault upon Adrian Taylor, and the related felony-weapon offense may not stand; (4) that, nevertheless, both the Assault conviction and the Possession of a Deadly Weapon conviction may stand and are affirmed; (5) that, therefore, there must be a remand for resentencing, in the process of which the State shall have the election to proceed under either § 612 or § 1447, but not both.

II.

The rationales and conclusions set out in *Hunter* provide the same results regarding the defendant's convictions for Manslaughter of William Lee Stephens and the related charge of Possession of a Deadly Weapon During the Commission of a Felony.

Davis is not applicable in this Manslaughter case. Like the Assault Statutes, the Manslaughter Statute lacks the legislative history and built-in enhancement provision of the Robbery Statute § 832, which was involved in *Davis*. Accordingly, it cannot be said, as in *Davis* regarding § 832 (a)(2) [the Robbery Statute], that the purpose and effect of § 632(2) [the Manslaughter Statute] is the same as § 1447 [the Deadly Weapon Possession Statute].

We hold, therefore, that the *Davis* case is inapposite and that the § 1447 conviction and sentence in the instant Manslaughter case do not fall by reason of *Davis*.

Again applying the principles, rationales, and conclusions announced in *Hunter*, we hold in the instant Manslaughter case: (1) that § 1447 creates an offense separate and distinct from the underlying § 632 felony of manslaughter, the legislative intent being to subject this defendant to multiple penalties for his single criminal act against William Lee Stephens; (2) that applying to the evidence in the instant case the "Blockburger-like rule"

adopted in *Hunter*, multiple punishments for the "same offense" have been imposed because § 1447 required proof of no fact not required by § 632(1), (2), or (3);[8] (3) that the defendant's constitutional guarantee against multiple punishment and double jeopardy having been violated, the cumulative sentences imposed by the Trial Court in the instant case for the manslaughter of William Lee Stephens and the related felony-weapon may not stand; (4) that, nevertheless, both the Manslaughter and the Deadly Weapon Possession conviction arising therefrom may stand and are affirmed; (5) that, therefore, there must be a remand for resentencing, in the process of which the State shall have the election to proceed under either § 632(2) or § 1447, but not both.

* * *

Affirmed as to the convictions; but the sentences are set aside and the cause remanded for further proceedings consistent with this opinion.

QUILLEN, *Justice*, with whom MCNEILLY, *Justice*, joins, concurring:

Having expressed my view in *Hunter v. State*, I find it unnecessary and undesirable to speak at any length in *Evans v. State*. In my judgment, the result reached by the majority is not constitutionally required and does not pay sufficient deference to the legislative policy-making role. But I do note that, as applied prospectively, the broad constitutional rule fashioned by the Court provides sufficient flexibility for the orderly administration of justice.

8. Because § 1447, in this case, requires that the State prove the existence of the underlying felony of manslaughter, every element of proof necessary to obtain a conviction for manslaughter is a necessary element of proof for a § 1447 conviction. Thus, for double jeopardy purposes, the offenses are manifestly "the same."

Moreover, if the General Assembly is dissatisfied with what the Court has done, the General Assembly can, consistent with the Court's opinions, change the statutory construction decision in *Davis* and, by the enactment for weapon possession of true enhancement provisions to the sections of the Criminal Code dealing with violent felonies, alter the result of the constitutional decisions in *Hunter* and *Evans*.

Solely on the basis of *stare decisis*, I concur in the judgment of the Court.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-749

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

STATE OF DELAWARE,

Petitioner,

v.

WALTER EVANS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

MOTION TO PROCEED IN FORMA PAUPERIS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-749

STATE OF DELAWARE,

Petitioner,

v.

WALTER EVANS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OR THE STATE OF DELAWARE

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent moves for leave proceed in forma pauperis pursuant to Rule 46.

Attached hereto is this Affidavit of the Respondent.

MORTON RICHARD KIMMEL

MICHAEL WEISS
Kimmel & Spiller, P.A.
401 Market Tower Building
Wilmington, DE 19801
Attorneys for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-749

STATE OF DELAWARE,

Petitioner,

v.

WALTER EVANS,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, WALTER EVANS, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; That in support of my motion to proceed on the Petition for Writ of Certiorari to the Supreme Court of Delaware without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceedings or to give security therefor; that I believe that I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs regarding the Petition for Writ of Certiorari to the Supreme Court of the State of Delaware are true.

1. Are you presently employed?

Yes. I am employed by General Motors Corporation, Boxwood Road Plant, Boxwood Road, Wilmington, DE

My average weekly gross wages are $427.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of any rent payments, interest, dividends, or other source?

No.

3. Do you own any cash or checking or saving accounts?

Yes. I have an account with the General Motors Credit Union with a balance of approximately $300.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothings)?

With my wife I jointly own a property at 1408 W. 7th Street, Wilmington, Delaware, 19802 subject to a mortgage. The approximate value of the home is $38,000.

5. List the persons who are dependant upon you for support and state your relationship to those persons.

I support Sally Evans, my wife; Ricky Evans and Jerry Evans, my children.

Leave to proceed in forma pauperis was not sought in any court below. Court proceedings below included the trial and appeal to the Delaware Supreme Court. The appeal to the Delaware Supreme Court included three oral arguments before that Court. I am still in the process of paying legal bills regarding the State of Delaware proceedings.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalities for perjury.

Walter J Evans
WALTER EVANS

SUBSCRIBED AND SWORN TO before me this 4th day of December, 1980.

NOTARY PUBLIC

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-749

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SUPREME COURT, U.S.

STATE OF DELAWARE,

Petitioner,

v.

WALTER EVANS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF FOR THE RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	i-ii
CITATION TO OPINION BELOW	1
OPPOSITION TO JURISDICTION	1
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	4
I. THE PETITION SHOULD BE DENIED FOR WANT OF A FEDERAL QUESTION	4-6
II. THE DECISION BELOW IS CORRECT	6-8
III. REVIEW IS NOT NECESSARY TO PREVENT FURTHER STATE CONFUSION	8
CONCLUSION	8

TABLE OF CITATIONS

CASES	PAGE
Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).	2,5,6,7
Brown v. Ohio, 432 U.S. 161, 97 S. Ct. 2221, 153 L. Ed. 2d 187 (1977).	7
Hunter v. State, Del. Supr., 420 A.2d 119 (1980), cert. filed, ___ U.S. ___ No. 80-283 (August 24, 1980).	1,4,5,6,7,8
Mental Hygiene Dept. of Cal. v. Kirchner, 380 U.S. 194 (1965).	6
North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).	7
People v. Brintley, 280 N.W. 2d 793 (Mich. 1979) appeal dismissed, Brintley v. Michigan, 444 U.S. 948 (1979)	6
Simpson v. United States, 435 U.S. 6, 98 S. Ct. 909, 55 L. Ed. 2d (1978).	7
Sours v. State, 593 S.W. 2d 208 (Mo.) vacated and remanded, ___ U.S. ___, 100 S. Ct. 2395, aff'd on rehearing, ___ S.W. 2d ___ 27 Ct. L. 2557 (August 18, 1980)	6
State v. Evans, Del. Supr., ___ A.2d ___ (1980).	4,6,7,8
State v. Morgan, 592 S.W. 2d 796 (Mo.) vacated and remanded, ___ U.S. ___, 100 S. Ct., 2395 aff'd on rehearing, ___ S.W. 2d ___ 27 Cr. L. 2557 (October 8, 1980)	6
Whalen v. United States, ___ U.S. ___, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980).	5,6,7
Ex Parte Lange, 85 U.S. (18 Wall) 163 (1873)	6,7

UNITED STATES CONSTITUTION	
Fifth Amendment	2
Fourteenth Amendment	2

CONSTITUTION OF THE STATE OF DELAWARE, 1897	PAGE
Article 1 §7	2,4
Article 1 §8	2,4
DELAWARE STATUTES	
11 Del C. §208	3,5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-749

STATE OF DELAWARE,

Petitioner,

v.

WALTER EVANS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent respectfully submits that this Court should deny the Petition for a Writ of Certiorari.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of the State of Delaware, which is not yet reported, is attached to the Petition for a Writ of Certiorari filed by Petitioner, the State of Delaware, in its Appendix "A". In addition, reference will be made to the Delaware copmanion case, State of Delaware v. Hunter, No. 80-283 (August 24, 1980).

OPPOSITION TO JURISDICTION

Respondent opposes the Petition of the State of Delaware because the Petitioner has failed to state a Federal Constitutional issue which should be considered by this Court.

QUESTION PRESENTED

Respondent respectfully submits that the Petition should be denied for want of a federal question. In the alternative, respondent submits that the following is the question properly before this Court:

Does the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment, prevent the imposition of multiple punishments for two crimes which can be classified as the "same offense," as defined by Blockburger v. United States, 284 U.S. 299 (1932).

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable United States Constitutional provisions alleged by the State of Delaware are set forth in the Petition for Writ of Certiorari filed by the State of Delaware. The following Constitutional provisions of the Constitution of the State of Delaware, 1897 are involved:

1. Article 1, Section 7:

> "In all criminal prosecutions, the accused hath a right to be heard by himself and his counsel, to be plainly and fully informed of the nature and cause of the accusation against him, to meet the witnesses in their examination face to face, to have compulsory process in due time, on application by himself, his friends or counsel, for obtaining witnesses in his favor, and a speedy and public trial by an impartial jury; he shall not be compelled to give evidence against himself, nor shall he be deprived of life, liberty or property, unless by the judgment of his peers or by the law of the land."

2. Article 1, Section 8:

> "No person shall for any indictable offense be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; and no person shall be for the same offense twice put in jeopardy of life or limb; nor shall any man's property be taken or applied to public use without the consent of his representatives, and without compensation being made."

STATUTORY PROVISIONS INVOLVED

In addition to the Delaware Statutory Provisions set forth in the Petition for Writ of Certiorari, the following

provision is involved:

11 Del C. §208

"Although a prosecution is for a violation of a different statutory provision or is based on different facts, it is barred by a former prosecution in a court having jurisdiction over the subject matter of the second prosecution under the following circumstances:

(1) The former prosecution resulted in an acquittal which has not subsequently been set aside or in a conviction as defined in §207 of this title and the subsequent prosecution is for:

a. Any offense of which the defendant could have been convicted on the first prosecution; or

b. The same conduct, unless:

1. The offense for which the defendant is subsequently prosecuted requires proof of a fact not required by the former offense and the law defining each of the offenses is intended to prevent a substantially different harm or evil, or

2. The second offense was not consummated when the former trial began.

(2) The former prosecution was terminated by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the second offense.

(3) The former prosecution was improperly terminated as improper termination is defined in §207 (4) of this title and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated."

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case as set forth by the State of Delaware in its Petition for Writ of Certiorari with the exception of the characterization of events leading to the shootings of William Stephens and Adrian Taylor.

After arriving at the house of Stephens, Respondent became involved in an argument with Stephens. Evans did not have the gun with him when he went to the Stephens' house. In fact, before going to Stephens' house, Evans had called the New Castle County Police Department requesting assistance. The police department refused to give assistance.

An argument between Evans and Stephens ensued. Stephens got a gun and came toward Evans. Stephens attempted to use the gun on Evans as a club. After a struggle, Evans got the gun away from Stephens. In the meantime, Taylor had gotten a hand gun and had begun firing at Evans. The gun in Evans' hand went off in self-defense.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED FOR WANT OF A FEDERAL QUESTION.

It is submitted that the Petition for a Writ of Certiorari should be denied because the decision of the Delaware Supreme Court below rested on independent State Constitutional grounds.

As indicated by Petitioner, the Delaware Supreme Court in State v. Evans, Del. Supr., ___A.2d ___ (1980) applied the decisional law of that Court adopted in Hunter v. State, Del. Supr., 420 A.2d 119 (1980), cert. filed, ___ U.S. ___ No. 80-283 (August 24, 1980).

Respondent's Brief in Opposition to the Petition for Writ of Certiorari in Hunter, supra., has already been filed. Respondent Evans here, relies upon the arguments advanced by the respondent in Hunter.

Respondents in both Hunter and Evans were convicted of assault offenses and possession of a deadly weapon during the commission of the assault offenses. However, in addition to the assault and deadly weapons offenses, Evans was convicted of the offenses of manslaughter and possession of a deadly weapon during the commission of the felony of manslaughter. As to those convictions, the Delaware Supreme Court stated:

> "The rationales and conclusions set out in Hunter provide the same results regarding the defendant's convictions for Manslaughter of William Lee Stephens and the related charge of Possession of a Deadly Weapon During the Commission of a Felony. (Evans at A9)"

In Evans, supra., the sentences imposed by the trial court was found to constitute double punishment, and were set aside. The case was remanded for resentencing.

The Delaware Supreme Court in Hunter and Evans held that sentencing for both possession of a deadly weapon during the commission of a felony and the underlying felony constituted double punishment (Evans at A8). These holdings were reached independent of Federal law by applying Delaware Constitutional and Statutory law: Constitution of the State of Delaware, 1897, Article I, §§7,8; 11 Del. C. §208(1)(b)(1). Hunter, supra., 420 A.2d at 130 f.n. 6,7.

11 Del. C. §208 (1)(b)(1) states that prosecution for the same conduct is barred unless:

> "The offense for which the defendant is subsequently prosecuted required proof of a fact not required by the former offense and the law defining each of the offenses is intended to prevent a subsequently different harm or evil...."

Based upon Delaware law, the Delaware Court stated:

> "'[T]he test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.' Blockburger v. United States, 284 U.S. 299, 304; 52 S. Ct. 180, 182; 76 L. Ed. 306, 309 (1932)"; Hunter, supra., 420 A.2d at 125.

In applying this test, the Delaware Supreme Court held that Evans' punishment constituted double jeopardy and remanded for resentencing. The State of Delaware argues that the Delaware Supreme Court's decision was incorrect. In support of its position the State relies upon this Court's decision in Whalen v. United States, ___ U.S. ___ 100 S. Ct., 1432, 63 L. Ed. 2d 715 (1980).

In Whalen, defendant had been convicted and sentenced separately for the felonies of rape and felony murder. This Court ruled that Congress had not intended cumulative punishments for these crimes and remanded the sentences because the lower court had exceeded the scope of its authority in imposing the sentences.

The State maintains that as a result of Whalen, an important federal question exists as to the role of the Delaware courts in interpreting criminal statutes and penalties enacted by the Delaware General Assembly. (Petition at p. 7). It is submitted that the State's analysis is incorrect.

Hunter was originally decided before Whalen. After Whalen, reargument was granted in Hunter to consider the impact of Whalen.

In Hunter, the Delaware Supreme Court acknowledged that in Whalen, supra., this Court had declared that the rule announced in Blockburger, supra., is "a rule of statutory construction" and not a substantive rule of law. Whalen, supra., 100 S. Ct. at 1438; Hunter, supra., 420 A.2d at 130.

In discussing the implications of Whalen to the States, the Delaware Courts stated:

> "That does not mean, however, that we may not adopt a Blockburger-like rule of substantive law to determine when two sentences constitute punishment for the 'same offense'." Hunter, 420 A.2d at 131.

Based upon Delaware law, the Delaware court did adopt such a rule.

The State next argues that this Court should grant certiorari because of the need for clarification in this area among the various States. (Petition at 7).

It is submitted that there is no need for clarification. This court has on previous occasions had the opportunity to accept certiorari to consider the impact of Whalen on the States, but has declined to do so, leaving it to each State to apply Whalen to its own law. State v. Morgan, 592 S.W. 2d 796 (Mo.) vacated and remanded in light of Whalen, ___ U.S. ___ No. 79-1602, 28 Cr.L. 4022 (October 8, 1980); Sours v. State, 593 S.W. 2d 208 (Mo.) vacated and remanded, ___ U.S. ___, 100 S. Ct. 2395, aff'd on rehearing, ___ S.W. 2d ___, 27 Cr.L. 2557 (August 18, 1980). See People v. Brintley, 280 N.W. 2d 793 (Mich. 1979), appeal dismissed for want of federal question, Brintley v. Michigan, 444 U.S. 948 (1979). See also Mental Hygiene Dept. of Cal. v. Kirchner, 380 U.S. 194 (1965).

For the foregoing reasons, it is respectfully submitted that Evans v. State, supra., rests upon adequate and sufficient Delaware Constitutional and Statutory grounds. For that reason, the Petition for a Writ of Certiorari should be denied.

II. THE DECISION BELOW IS CORRECT

Respondent here once again relies upon the Argument II of the Respondent in State v. Hunter, supra., in her Brief in Opposition.

It is submitted that the Delaware Supreme Court correctly applied the line of cases of this Court dealing with the issue of double jeopardy such as Ex Parte Lange, 85 U.S. (18 Wall) 163

(1873), Blockburger v. United States, supra.; North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed. 2d 656 (1969); Simpson v. United States, 435 U.S. 6,98 S. Ct. 909, 55 L.Ed. 2d (1978); Brown v. Ohio, 432 U.S. 161,97 S. Ct. 2221, 153 L.Ed. 2d 187 (1977).

It is submitted that in Hunter and Evans, the Delaware Supreme Court correctly distinguished Whalen, supra. Hunter and Evans deal with imposition by a trial court of double sentences for the same offense consistent with the will of the legislature. Whalen does not reach that issue. The decisions of the Delaware Supreme Court in Hunter and Evans are consistent with the decisions of this Court that do reach the issue. Simpson v. United States, supra., Brown v. Ohio, supra.

In Hunter, the Delaware Court quoted Whalen:

> "'The double jeopardy clause at the very least precludes federal courts from imposing consecutive sentences unless authorized to do so. The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitional framework the legislative power, including the power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress....If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty.' 100 S. Ct. at 1436-1437, 63 L.Ed. 2d at 722 (Citations omitted)." Hunter v. State, 420 A.2d at 127-128. (Emphasis added).

It is submitted that the Delaware Supreme Court correctly distinguished Whalen:

> "We distinguish Whalen. That case concluded that Congress had not intended to punish doubly for the crimes of rape and felony murder. Thus, the analysis stopped with the determination that the District of Columbia Court of Appeals had exceeded its legislative authorization in affirming consecutive sentences. On the other hand, our analysis here does not terminate but, in fact, only begins with a determination of the legislative intent behind §613 and §1447. We are presented with a question wholly different that that posed in Whalen. There, the concern was the scope of the Double Jeopardy Clause when cumulative punishment for the identical crime is imposed contrary to the intent of the Congress. Here, we are confronted with the question of the scope of the Double Jeopardy Clause when cumulative punishment is meted out for the 'same offense' consistent with the will of the General Assembly." Hunter, 420 A.2d at 128, 129.

Hunter, supra. and Evans, supra., are consistent with the pronouncements of this Court. Therefore, the State of Delaware's Petition for a Writ of Certiorari should be denied.

III. REVIEW IS NOT NECESSARY TO PREVENT FURTHER STATE CONFUSION

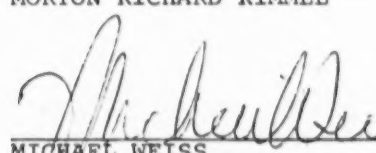
For the reasons set forth in Arguments I and II herein and in Arguments I and II of the Respondent's Brief in Opposition in Hunter v. State, it is respectfully submitted that a review of these decisions is not necessary to prevent State confusion.

CONCLUSION

For the reasons set forth herein and in Respondent's Brief in Opposition in Hunter v. State, it is respectfully submitted that this Court should deny the Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware.

Respectfully submitted,

MORTON RICHARD KIMMEL



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